

Testimony of

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on

Title II of S. 2097

"The Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998"

Mr. Chairman, Mr. Vice-Chairman and Members of the Committee:

Good morning. My name is Phyllis C. Borzi, and I am a senior research staff scientist at the Center for Health Policy Research of the George Washington University Medical Center. I am honored to be invited to testify before you today on Title II of the Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998.

Early this year, the Center completed a study entitled "Assessment of Access to Private Liability Insurance for Tribes and Tribal Organizations with Self-Determination Contracts/Compacts." I was the primary author of that study. Although the study had a somewhat narrower focus than the provisions of Title II of S. 2097, many of the issues that we examined and information that we gathered. may be relevant to your consideration of the bill.

In the few minutes that I have this morning, I will briefly describe our study, summarize the relevant findings and recommendations, and comment on several issues raised by S. 2097. I have provided the Committee with a copy of the entire study, including the "Handbook for Tribes on How To Reduce Private Liability Costs," which we prepared. I must stress, however, that the views I express here today are my own and do not reflect the views of the Federal

agencies that funded our study or the representatives of those agencies who served on our Technical Advisory Committee.

### **Description of Purposes and Methodology of the Study**

In a series of steps beginning in 1987, Congress extended the protections of the Federal Tort Claims Act (FTCA) to tribes and tribal organizations carrying out programs under the Indian Self-Determination and Education Assistance Act (ISDEAA) (P.L. 93-638). As you know, the FTCA provides immunity for certain tribal entities and individuals against common law tort claims arising from acts or omissions that are both within the scope of self-determination contracts and within the scope of the individual's employment as a matter of state law. Although not "insurance" in the conventional sense, the FTCA operates in a way similar to insurance by protecting covered entities and individuals from direct and personal tort liability, thus reducing or eliminating the need for commercially purchased liability insurance.<sup>1</sup> One objective of Congress in extending FTCA coverage was to reduce the need for private liability insurance for self-determination activities. Yet today, a decade later, some tribes, tribal organizations, and insurers still appear to be unaware of either the existence or the breadth of FTCA coverage with

*1 The term "coverage" under the FTCA is used as a shorthand for the principle that the FTCA provides immunity to P.L. 93-638 contractors and compactors and their employees from direct liability for certain injuries they may have committed. If a claim is "covered" under the FTCA (i.e., meets all the requirements specified in the Act), the United States steps into the shoes of the tribal defendant(s) and assumes liability for the claim. Consequently, private liability insurance is unnecessary for claims covered by the FTCA.*

respect to P.L. 93-638 activities. The cost savings that were expected to result from extending FTCA coverage to tribes and tribal organizations do not appear to have been fully realized.

For a number of years after FTCA coverage was extended to self-determination contractors, tribal representatives expressed concern about the availability and cost of private liability insurance. Some tribes had difficulty in obtaining private liability insurance at all; others complained that the quoted rates seemed inordinately high. Since many tribal activities are funded under self-determination contracts or compacts and potential tort claims involving those activities are generally covered under the Federal Tort Claims Act (FTCA), the question was: why were tribes paying so much for commercial liability coverage that was merely supposed to supplement their immunity from tort liability under the FTCA?

The U.S. Department of Health and Human Services, in conjunction with the Departments of Interior and Justice, contracted with the Center for Health Policy Research (CHPR) of the George Washington University Medical Center to examine tribal experiences in purchasing private liability insurance to supplement coverage under the FTCA. The Center was asked to assess tribal access to commercial liability insurance and recommend strategies to help the tribes find more affordable insurance to supplement or "wrap around" their FTCA coverage. To empower tribes to be better purchasers of commercial liability insurance, however, it was crucial that they better understand the extent to which their liability for potential negligence was already covered under the FTCA. Until tribes had a more complete understanding of the extent of their tort immunity under the FTCA, it seemed unlikely that they could adequately assess their need for supplemental private liability insurance. So our study was focused on issues surrounding tribal experiences with private liability insurance and the FTCA.

The specific purposes of the study were:

- (1) to examine access to private liability insurance by tribes and tribal organizations operating programs under the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638, and the coordination of that insurance with the immunity from tort liability

for self-determination contractors and compactors and their employees provided under the FTCA,

- (2) to identify barriers to the appropriate pricing of private liability insurance; and
- (3) to recommend strategies to assist contracting and compacting tribes and tribal organizations to assess their need for private liability insurance and obtain this insurance at reasonable prices.

To help guide the study, we established a technical advisory committee (TAC). The TAC was comprised of representatives of three Cabinet departments: (1) the Department of Justice (DOJ), Torts Branch, Civil Division; (2) the Department of Health and Human Services (DHHS), including representatives of the Office of the Assistant Secretary for Planning and Evaluation (ASPE), the Office of Assistant Secretary for Management and Budget (ASMB), the Office of the General Counsel (OGC) and the Indian Health Service (IHS); and (3) the Department of the Interior (DOI), including representatives of the Office of the Solicitor and the Bureau of Indian Affairs (BIA). During the course of this study, the TAC met regularly to assess the study's progress and make recommendations to the research project staff.

All federally recognized tribes and national and regional tribal organizations received an announcement from the IHS describing the study objectives, the different elements of the study, and the CHPR project staff. The announcement invited tribes and tribal organizations to contact representatives from the BIA, IHS, or research project staff if they wanted to participate in the study. We specifically sought information about both positive and negative experiences in securing private liability insurance. Twenty-two tribes and tribal organizations volunteered to be included in the study.

Let me identify up front some of the limitations of our study. Because participation in the study was voluntary, we made no attempt to categorize or compare tribal experiences throughout

Indian country. Our goal simply was to provide information that would help tribes secure appropriate and affordable private liability insurance. In addition, the study was limited in funding and scope; therefore, it was not possible to select a representative sample of all P.L. 93638 contractors and compactors. It was clear from the study's inception that because of the self selected nature of the participants, the study would not necessarily yield statistically valid data that could be generalized to all P.L. 93-638 contractors and compactors. But we expected, however, that the participating tribes would provide useful information about their problems and successes in obtaining appropriate and reasonably priced liability insurance policies, and that it was valuable to share this information more broadly with other tribes.

As it turned out, the twenty-two tribes and tribal organizations that volunteered to participate in the study constituted a geographically diverse group and provided contact with tribal governments, health clinics and other tribal entities.

Researchers held initial telephone conversations with each of the tribes and tribal organizations to determine their familiarity with and understanding of the FTCA and the FTCA claims process, and to learn about their experiences in obtaining private insurance coverage. A series of key questions were developed and refined to serve as a general guide for these conversations, although specific questions and follow-up requests for information were often tailored to the individual participant's responses.

During the telephone interview and site visit stages of the project, tribal participants were asked to supply names of brokers and insurance companies providing private liability coverage to them either currently or in the past. These brokers and insurance companies were contacted and invited to participate in the study. Although some of them agreed to participate, the non response rate was high, particularly among insurance companies, even after follow-up telephone calls.

Nearly all of the brokers and insurance companies providing coverage to site visit participants, however, agreed to participate in the study; but obtaining useful information from the insurance companies was substantially more difficult than gathering information from the brokers.

An important issue in negotiating private insurance coverage is the interaction between the FTCA and supplemental private insurance. Thus, at the recommendation of the TAC, individuals in the DOI field solicitors' offices and in the DHHS Office of the General Counsel were interviewed to obtain background information with respect to the FTCA claims filing and coverage experience of the tribes. Representatives of the Civil Torts Division of the DOJ were also interviewed during this preliminary information-gathering phase of the study. Another meeting with DOJ occurred at the end of the project to further clarify the FTCA administrative claims process and to discuss other substantive issues raised during the site visits and the tribal consultation meeting. Other opportunities for consultation and input from DOJ also took place during the drafting stages of the study and accompanying handbook as we consulted DOJ on several occasions to clarify issues as they arose.

In addition, several tribes and tribal organizations were willing to provide us with copies of their current insurance policies. Although we reviewed the terms of the policies themselves, they generally did not contain pricing information. During subsequent interviews, tribes and 6 tribal organizations shared limited pricing information with us.

The next phase of the study consisted of three multi-day site visits to tribes and tribal organizations. In preparation for the site visits, researchers developed selection criteria and further refined key questions that had originally been used in the initial telephone interviews. Researchers used four criteria to select the site visit participants: (1) the willingness of the tribe or tribal organization to take part in the site visits; (2) the extent of their knowledge and experience

with the FTCA and private liability insurance; 2 (3) their proximity to one another; 3 and (4) the amount of P.L. 93-638 funding they received.<sup>4</sup>

The three areas selected for site visits were the southwestern United States (New Mexico and Arizona), northern Wisconsin, and the Pacific Northwest (Alaska and Washington State). A total of twelve tribes and tribal organizations participated in the site visits. The site visits also included meetings with six insurance brokers (three of whom represented one company that had developed a special insurance product for tribes and tribal entities), and one insurance company. While conducting the on-site interviews, we gathered names of other brokers and insurance companies active with tribes and tribal entities and followed up on these leads. We conducted

*2 We selected participants for the site visits that represented a wide range of knowledge and experience with the FTCA and private liability insurance.*

*3 A map was prepared showing the geographic locations of each of the potential study participants. To make the most efficient use of travel time and our travel budget, we focused on the areas in which potential participants were most concentrated. In evaluating which of these areas of concentration to visit, we attempted to include geographically diverse regions of the country.*

*4 We attempted to visit tribes and tribal organizations with a sufficiently large share of P.L. 93-638 funding so that the existence of FTCA coverage might have a meaningful impact on their private insurance premiums.*

in-depth telephone interviews with three additional brokers. We also contacted three nationwide insurers that currently sell liability coverage to tribes and tribal organizations. One was eventually interviewed after a substantial delay in responding to our requests; another referred us to one of its subsidiaries which failed to respond to our repeated inquiries; and a third refused to talk with us directly, but referred us to its internal department of governmental affairs and media at the home office for information (which we decided not to pursue because, in our judgment, it was

unlikely that pursuing this process would lead to contact with someone knowledgeable about these issues within the company in a timely fashion).

In addition, researchers also received information about two insurance companies that had been established as "captive" insurance companies because of the lack of interest on the part of existing insurance companies in writing tribal coverage.<sup>5</sup> In one instance, the captive insurance company was set up by a brokerage firm; in the other, it was a joint venture between brokers, consultants, and reinsurers. In each case, the captive insurer was established solely to underwrite tribal coverage.

Ultimately, we were successful in interviewing (either on-site or by telephone) representatives of one nationwide insurance company, two tribally chartered insurance companies, and one reinsurer bringing the study's interview total to nine brokers and four insurance companies. To facilitate our discussion with tribes, brokers and insurers, we prepared a background paper on the history of tribal coverage under the FTCA. This paper was included

*5 Generally "captive" insurance companies are closely-held (i.e., owned by a small group of people) subsidiaries of an existing entity. A captive insurance company is typically created to provide insurance for an enterprise or a group of enterprises that have difficulty securing commercial insurance in the marketplace from existing insurance companies.*

in our final report.

A tribal consultation meeting was held on April 23, 1997, attended by all members of the TAC, representatives from four tribes, and a Washington, D.C. lawyer with numerous tribal clients. At this meeting, the research group presented preliminary findings and recommendations from our site visits and conducted a group discussion. The discussion generated a number of useful comments and suggestions which were incorporated into the report.



Finally, we developed a handbook for tribes and tribal organizations. The handbook describes in layperson's terms the liability coverage available under the FTCA, the potential need for private liability insurance to supplement FTCA coverage, and strategies to help tribes reduce private insurance costs. The handbook was included in our final report.

## **Our Findings**

The principal findings of the study are as follows:

- 1 . The immunity from tort liability provided by the FTCA can be very beneficial for tribes and tribal organizations involved in P.L. 93-638 activities. Working with knowledgeable brokers, some tribes and tribal organizations report that they have been able to reduce their private liability insurance premiums substantially and, in some cases, completely drop certain types of coverage (e.g., medical malpractice) because of the FTCA.
2. Some tribes and tribal organizations involved in P.L. 93-638 contracting, however, may not have fully realized the benefits of the FTCA, because of the uncertainty, confusion, and lack of understanding among tribes, brokers, and insurance companies as to what activities are covered by the FTCA, when private sector coverage is unnecessary or duplicative, or how a FTCA claim proceeds through the system. This problem persists despite the publication of regulations under Title I of the Indian Self-Determination and Education Assistance Act Amendments ("1996 Regulations"), issued in June, 1996, which contain useful information about the FTCA for P.L. 93-638 contractors and compactors.
3. The difficulty that tribes and tribal organizations have in determining what private coverage they need to supplement their FTCA immunity may be compounded by what they describe as inconsistencies in how Federal personnel determine that particular claims are covered under the FTCA. Tribes, tribal organizations, and brokers report that there does not appear to be a uniformly applicable framework for coverage or a precedent-based decision-making system the results of which are available publicly. It is, therefore, hard for tribes, tribal organizations and insurers to judge the types of claims that might be covered under the FTCA and even harder to evaluate the extent to which private liability insurance is necessary or duplicative. This appears to be more of a problem with non-medical claims.
4. Notwithstanding the perception of self-determination contractors and brokers that there is no way to predict when the FTCA will apply to a particular tort claim because this decision requires a case-by-case analysis, a general framework for analysis of the FTCA's applicability to tort claims involving P.L. 93-638 contractors and their employees can be constructed that provides some assistance in assessing the likelihood that private liability insurance may be needed.

5. Tribes and tribal organizations report that the lines of communication between themselves and the Federal agencies involved in PTCA decision-making need to be improved. Tribes and tribal organizations report difficulties in determining a claim's status and resolution and receiving timely responses to tribal inquiries as to whether a claim will be covered or not by the FTCA.
6. Many insurance companies are unfamiliar with the FTCA and its applicability to self-determination contractors. Other insurers are uncertain about the reach of the FTCA and the process for filing an FTCA claim. As a result, some insurers may misconstrue, underestimate, or disregard the value of the FTCA in designing private liability insurance coverage for tribes and tribal organizations and in determining premiums to be charged for that insurance coverage. Because the level of sophistication about tribal tort immunity through the FTCA varies substantially, the number of insurers willing to write tribal coverage, while growing, is still relatively small. This is surprising in that insurers routinely sell coverage to state and local governmental entities that have basic grants of immunity under statutes that are similar to the FTCA and therefore would have the same need as tribes for only supplementary private insurance coverage.

## **Our Recommendations**

The principal recommendations of the study are as follows:

1. A clearinghouse could be created through which tribes and tribal organizations could share information about their experiences with the purchase of private liability insurance.  
  
In addition, to facilitate networking among tribes, a web page could be created. The web page could include general information on the FTCA and list the designated regional contact people within the responsible agencies who can be contacted for more specific assistance.
2. The Secretaries of Health and Human Services and the Interior, in conjunction with the Department of Justice, could conduct informational meetings in various regions to acquaint tribes, tribal organizations, brokers, and insurance companies with the basic principles of immunity from tort liability provided for self determination contractors under the FTCA.  
  
The purpose of these meetings would be: (a) to assist tribal self-determination contractors

to better understand the immunity from tort liability provided under the FTCA in order to improve their ability to purchase non-duplicative private liability insurance; and (b) to assist brokers and insurance companies to develop appropriate insurance products.

3. Informational materials could be developed for distribution to P.L. 93-638 contractors. These materials should be written in clear and understandable layperson's language. They would generally describe the immunity provided to self-determination contractors under the FTCA and identify (to the extent possible) the types of activities that may not be protected so as to assist tribes in understanding the extent to which they may need supplemental private liability insurance. These materials could be used by the tribes to share with brokers and representatives of insurance companies who are unfamiliar with the FTCA. The *Handbook for Tribes on How to Reduce Private Liability Insurance Costs* (which is part of this report) and the 1996 Regulations could serve as starting points. To maximize the usefulness of these materials for tribes in their negotiations with insurance companies, any guidance should be issued by the Federal government, since privately issued materials on the FTCA may be perceived as less authoritative.
4. Principles for determining more clearly when private liability insurance duplicates tribal FTCA immunity could be developed and communicated to all P.L. 93-638 contractors and compactors. In addition, examples of insurance contract language that does not duplicate the FTCA could be identified and shared with and among tribes, tribal organizations, brokers, insurance companies, and the Federal government.

5. If they have not yet done so, tribes and other P.L. 93-638 contractors and compactors should designate a tribal tort claims liaison with the Federal agencies for purposes of the FTCA, as the 1996 Regulations instruct. Similarly, the agencies should provide the tribal contractors with a list of key regional contact persons who can act as resources for the tribal contractors on FTCA matters.
6. Misunderstandings and confusion about FTCA could be reduced by improving communications between self-determination contractors and Federal agencies.
7. More consistent interpretation and application of policies and procedures within and across Federal agencies would reduce confusion about FTCA issues. For instance, consideration could be given to developing consistent internal agency procedures for determining whether a claim will be covered under the FTCA. In addition, agencies could develop standardized responses to tribes that request information about the FTCA from the government. They also could develop a "to-whom-it-may-concern" letter verifying and explaining FTCA coverage of P.L. 93-638 activities, which could be used by the tribes when dealing with brokers, insurance companies, and other entities that require verification of FTCA coverage.
8. To the extent possible, a body of general information about claims filed under the FTCA could be developed. An on-line claims registry could be organized by type, location and disposition of claim. This registry would be for internal agency use to facilitate consistency in interpreting the FTCA.

9. Consideration could be given to the creation of a 'Publicly available data base containing the same type of information as would be in the claims registry but, if necessary to maintain confidentiality, available without tribal or individual identifying information.
10. The Federal agencies could consider issuing additional clarification on FTCA coverage of certain activities which have been the source of particular confusion for tribal contractors, such as employment-related torts.

## **Our Conclusions**

After a number of years in which tribes and tribal organizations experienced difficulty in finding private liability carriers willing to insure them at all, let alone at reasonable prices, today's marketplace offers both opportunities and challenges. Some tribes have leverage to negotiate lower rates, and they have a choice of insurers. They often have more than one carrier vying for their business, as the wide variety of enterprises in which the tribes are engaged (not all of which are covered under the FTCA) are attractive sources of income to insurance companies.

The grant of immunity from tort claims provided under the FTCA for P.L. 93-6)8 activities is extremely valuable to tribes and tribal organizations, particularly tribal health clinics. But extending FTCA immunity to self-determination contractors and compactors should have resulted in their paying less for private insurance. However, a lack of awareness of the applicability of the FTCA and/or a full understanding of its scope appear to have prevented some tribes from doing so. One of the most important steps that tribes can take to lower their private liability costs is to become better informed about the fundamentals of the FTCA and the kind of

commercial insurance they need to supplement the immunity from tort claims that the FTCA provides self-determination contractors and compactors and their employees. Once they become more educated consumers, tribes can use that information to negotiate more effectively with brokers and insurance companies. Among the tribes in our study were some whose understanding of the FTCA enabled them to purchase cheaper private liability insurance that does not duplicate the coverage already provided under the FTCA. Knowledgeable brokers have worked closely with some tribes and tribal organizations to develop insurance products that meet those tribes' needs and significantly reduce their private insurance costs.

The Federal government can help tribes and tribal organizations by providing more accessible information about the FTCA in a form that is simple and useful to laypersons. Tribes and tribal organizations can help each other by sharing information about their experiences in obtaining appropriate and reasonably priced insurance.

### **Specific Comments on Title II of S. 2097**

When we undertook the tribal liability insurance study, we quickly learned how little information was available about many critical issues. For instance,

1. How many tribes purchase commercial liability insurance?
2. Of the tribes that do, what types of insurance do they purchase?
3. What is the extent and limits of their coverage (i.e., is it "gap" or comprehensive coverage)?
4. How much does it cost each year?
5. What is the claims history under each policy? What types of claims have been brought against the tribe? How were the claims resolved (dismissed, settled, litigated?)

6. How many tribes self-insure? What mechanism do they use to do this?
7. How many tribes participate in a purchasing consortium or other group purchasing mechanism?
8. How many tribes decide not to purchase additional private liability insurance? What factors influence this decision? What happens when an individual is injured on the reservation? Does the tribe treat injuries of tribal members different from injuries of non-tribal individuals?
9. If the tribe purchases commercial liability insurance, does the insurer take into consideration FTCA immunity in pricing the policy? If so, how is this done? If not, why not?
10. Does the insurance company have the right to assert the tribe's sovereign immunity? If so, under what circumstances? Who makes the decision to raise sovereign immunity?
11. To what extent is the tribe consulted if the insurer decides to settle a tort claim?
12. How many claims against tribes or tribal organizations have been filed under the FTCA? How many have been determined by the Department of Justice to involve covered claims? How many have been rejected? What is the ultimate disposition of claims that are covered under the FTCA? How much in judgments or settlement fees has been paid on behalf of tribes? Is there a pattern in the cases?

Of course, there were no answers to any of these questions. Nor did our 16 months of research yield any concrete statistics in these critical areas. Therefore, the study and report to Congress required under section 202 of the bill is critical. But collecting the information necessary for sound policymaking in this area is not necessarily as easy as it seems and drawing conclusions from the data collected may have limitations.

Based on our experiences, I offer the following suggestions and observations:

1. **Careful preparation is necessary to make the study as comprehensive and useful as possible.**

As a researcher, I am always tempted to ask for more information rather than less, because it is very difficult to anticipate what types of information might ultimately be useful in designing a program to provide supplemental tort liability coverage. However, the usefulness of any data is

directly related to the reliability of the data. Our study used a variety of techniques to assure that the information we received was reliable: preliminary general initial interviews, follow-up telephone calls with additional questions, extensive on-site interviews, and review of actual insurance contracts. Talking to several people from each tribe, rather than just one, was also a check on the reliability of the information we received. However, using a combination of these techniques was costly, time-consuming and labor-intensive.

In conducting the study required under section 202, the Secretary may not have the resources or the time to employ all of these methods. Typically, one would expect that the primary vehicle for collecting information about tribal liability insurance would be a requirement to fill out a form or provide details about tribal coverage when a tribe receives a "tribal priority allocation." The form used to collect the information should be simple but standardized. If additional detail is required, the instructions to the form should be clear about what must be supplied (e.g., a copy of the declarations page of the insurance policy or the policy itself). Determining what coverages tribes have and the limits of that coverage may be difficult. The language of insurance is arcane and confusing to most people and the tribal representative to whom falls the task of filling out the Secretary's form may be no more experienced in this area than anyone else.

**2. Determining the adequacy of tribal private liability coverage is at best difficult; at worst, it may be impossible.**

Section 201 requires the Secretary to determine on a tribe by tribe basis whether the supplemental private liability insurance the tribe has is adequate. To the extent that a tribe has no supplemental coverage, the bill appears to require the Secretary to provide it. If the tribe has coverage, then the question of adequacy must be addressed. But to determine whether tribal.



supplemental coverage is adequate, one has to have a clear idea of the parameters of the coverage to be supplemented. However, because of the nature of the FTCA itself, determining what is and is not covered under the Act is not easy.

Each claim that is filed under the FTCA is examined on a case-by-case basis and many of the factors that bear most significantly on coverage decisions are matters of state law. As we conducted our site visits, each of the tribal representatives complained about the lack of certainty over what claims were actually covered under the FTCA and urged us to recommend that the government provide more clarity. But after our months of research, even the three lawyers on the project agreed that the type of certainty the tribes sought was not possible.

**3. The Secretary must work closely with representatives of the Department of Justice who administer FTCA coverage to develop guidelines for assessing the adequacy of private liability insurance.**

The goal of all parties is to assure that tribes have private liability insurance that is appropriate, but not excessive. As previously noted, this balance is often hard to strike.

The FTCA provides immunity only to a self-determination contractor and its employees carrying out a P.L. 93-638 contract. But the tribal employees must be carrying out their duties under the contract and performing activities that are within their job or position description. Although the scope of the P.L. 93-638 contract issues are matters of federal law, whether an employee is acting within the scope of employment in carrying out those activities is a matter of state law. Distinguishing between official duties and voluntarily undertaken activities may require fact-intensive analysis that differs in each case. Given the variability of state employment law and the complicated factual nature of the analysis necessary to reach a legal judgment, making generalizations as to whether certain fact patterns will result in FTCA protection may not be

possible.

As a result of this uncertainty, some tribes have chosen to purchase more comprehensive private liability insurance that may duplicate some of the protection they may have under the FTCA. In that case, the Department of Justice has required insurers to bear the cost of litigating claims that are covered under the FTCA. The Department's lawyers will stay involved in the litigation and work with the insurance company's lawyers, but the insurer bears the litigation cost and pays any judgment due up to the limits of the policy. Again, the problem is that it may be impossible to determine before a claim is filed whether or not the claim will be covered.

During the course of our study, we examined a few private liability insurance policies purchased by tribes and were surprised to find that none contained language that we think would solve this problem of potential duplicative coverage. A simple statement, such as "This policy covers only tort claims not covered under the FTCA," would be helpful in making clear to the Justice Department that the coverage is not duplicative. More difficult, of course, is the question of how the insurance underwriter would price that policy.

**4. The provision contained in section 201(c) requiring insurance policies to contain provisions waiving the insurer's right to assert a tribe's sovereign immunity is essential and should be made effective with respect to any policy or contract of insurance entered into or renewed after the date of enactment.**

Generally the liability policies we examined were silent as to the right of the insurance company to raise the tribe's sovereign immunity as a defense. A few contained a provision that stated that the insurer would only raise the immunity defense if the tribe authorized the company to do so in writing. However, one insurance company representative with many clients in Indian country bragged to us that every time a claim was filed against the policy, the insurer routinely raised immunity to defeat the claim. The premiums charged by this company were no lower than

other insurance companies writing tribal liability insurance that did not raise the immunity defense. We found it quite troubling that this insurer charged tribes so much for coverage, even though its exposure for claims was practically non-existent. When we asked one of this insurer's tribal clients whether, as a hypothetical matter, the tribe approved of an insurer using the tribe's sovereign immunity in this way, the tribal representative remarked, "Why would a tribe pay an insurance company if it planned to avoid all claims by raising immunity? The tribe could do that itself, it wouldn't need insurance."

**5. If the Secretary is required to establish a program to provide Federal supplemental insurance, it must be actuarially sound.**

Section 201 contemplates that some type of Federal supplemental coverage will be made available to tribes which do not have adequate supplemental tort coverage. This raises a number of questions, both philosophical (e.g., should Congress require all tribes to have insurance to compensate parties who are injured by the tribe's negligence or should the decision to supplement FTCA coverage be made by each tribe) and technical. Regardless of whether such supplemental insurance is mandatory or voluntary, any Federal insurance program must be actuarially sound. The greater degree of flexibility that the tribes have either in determining whether they want supplemental coverage or whether they will purchase supplemental coverage in the private marketplace or from the Federal government, problems of adverse selection will arise. Clearly professional risk managers must be consulted before such an undertaking gets too far along. There are many other technical details that must be examined as well. At a minimum, however, the bill should require the Secretary to set premiums at a level that assures the pool's actuarial soundness.

**6. Legislation could provide the Secretary with flexibility in fulfilling the mandate to obtain or provide liability insurance for tribes.**

The Secretary could decide to make supplemental liability coverage available to tribes in various ways, such as:

- By operating a Federal insurance program.
- By using the Federal Employees Health Benefits Program (FEHBP) model (i.e., setting minimum Federal criteria for coverage, then permitting any insurer that wants to offer such a package to participate in the program with the Secretary's oversight).
- By using a variant of the FEHBP model (e.g., setting minimum Federal criteria for coverage, then utilizing a competitive bidding process, selecting one or more private carriers to offer the supplemental insurance).
- By setting minimum Federal standards for the coverage and solvency, but offering a Federal charter to any purchasing consortium of tribes or tribal organizations or any self-insured risk pool established by one or more tribes or tribal organizations.

**7. Existing insurance arrangements that provide adequate supplemental tort coverage for tribes in a cost-efficient manner should not be disrupted.**

Some insurers and brokers have spent considerable time developing private liability insurance programs that are tailored to meet the needs of individual tribes and take into consideration their coverage under the FTCA when applicable. To the extent that these programs do the job in a cost-efficient manner, Federal legislation should not disrupt them. On the other hand, as previously noted, we did discover at least one example of an insurer that was not providing its tribal clients with a fairly priced product (i.e., the insurer that was using sovereign immunity to defeat all claims).

**8. The Committee should consider asking the General Accounting Office to evaluate the adequacy of tribal regulation with respect to solvency and consumer protections for tribally-chartered insurance companies.**

Although beyond the scope of our study, more careful evaluation of the operation of

tribally-chartered insurance companies may be desirable. A number of people we interviewed expressed concern about the degree to which tribally-chartered insurance companies appear to escape the type of initial scrutiny and ongoing monitoring with respect to solvency and consumer protections that insurance companies that are regulated by the states undergo. Although there are not many currently in operation, if Congress were to require all tribes to secure adequate supplemental liability coverage, it might become a more attractive option to establish a tribally-chartered insurance company to provide that coverage. The GAO could provide an objective evaluation of the strengths and weaknesses of tribal regulation of insurance.

## **Conclusion**

In conclusion, S. 2097 is a good first step toward assuring tribes access to more adequate and more affordable private liability insurance to supplement the protection from tort liability that self-determination contractors have under the FTCA. This is a complex issue, but one which is important not just to the tribes themselves but to others who visit or engage in commercial activities on tribal lands.

I understand that the bill is a work in progress and to the extent that I can be a resource for members of the Committee or your staff, please feel free to contact me.

Thank you again for inviting me to testify and I will be pleased to take your questions.